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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO. _____

RICHARD L. ANDERSON,
Petitioner,

V.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to The
United States Court of Appeals for The
Seventh Circuit

Loren R. Honecker
Counsel for Petitioner
155 Park Central Square
Springfield, Missouri 65806
(417) 866-7272

QUESTIONS PRESENTED

I. Whether the District Court, in a criminal case before it, had jurisdiction to order, pursuant to a summary proceeding instituted on the Court's own motion, defense counsel to make restitution of a portion of a fee charged and paid for representation of Defendant in an entirely different proceeding which was not before the Court at that time.

II. Whether the lower courts abused their discretion in finding, pursuant to a summary proceeding, an attorney's fee to be excessive, and in ordering and upholding restitution to the Court of a portion of said fee.

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OPINIONS BELOW

The opinion of the U.S. District Court for the Central District of Illinois, Springfield Division, reproduced in the Appendix hereto, infra pp. 7, is reported in 581 F. Supp. 875-878. The opinion of the U.S. Court of Appeals for the Seventh circuit, reproduced in the Appendix hereto, infra pp. 12, reported in 800 F.2d 704 (7th Cir. 1986)

JURISDICTION

The judgment of the U.S. District Court for the Central District of Illinois, Springfield Division, (Appendix, infra pp. 7) was entered on Janaury 17, 1984. Petitioner duly appealed this ruling to the U.S. Court of Appeals for the Seventh Circuit, which affirmed the trial court by opinion dated September 10, 1986 (Appendix, infra pp. 12). A timely Petition for Rehearing was filed by Petitioner on September 24, 1986, which was denied by Order of October 30, 1986 (Appendix infra p. 19). the jurisdiction of the U.S. Supreme Court to review this case by Writ of Certiorari is involved pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Amendment V, U.S. Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. § 3006A(F) (Appendix, p. 22)

21 U.S.C. § 881 (Appendix, p. 23)

Rules IV and V, District Court for the Central District of Illinois Code of Professional Responsibility, § 2-106 (Appendix, p. 21)

STATEMENT OF THE CASE

This matter involves issues which arose from the factual matrix set by two criminal proceedings filed in the U.S. District Court for the Central District of Illinois, Springfield Division. In September, 1981, Ronald Strawser (hereinafter Ronald) was indicted on two counts of conspiracy and one count of distribution, all counts dealing with large amounts of marijuana. On December 28, 1981 Ronald entered a plea of guilty in this cause; a second indictment was returned levying an additional charge of marijuana possession against Ronald, combined with two counts of possession and one count of conspiracy against Ronald's double first cousin, Michael Strawser (hereinafter Michael). Petitioner Richard L. Anderson (hereinafter Petitioner), a Kimberling City, Missouri attorney, represented Ronald throughout the course of the original proceeding, and entered an appearance on his behalf in connection with the second indictment. He did not, however, enter an appearance on behalf of Michael; rather, he filed a motion with the Court seeking to be appointed in that capacity, due to Michael's indigency. This motion was supported by affidavits of both Ronald and Michael, denying the existence of any conflict of interest.

Notwithstanding the foregoing, however, on September 16, 1982, the Magistrate appointed another attorney, Mr. Michael Kopec, to represent Michael.

The instant controversy was kindled by a letter written April 11, 1983, by Ronald to the trial judge, Honorable J. Waldo Ackerman. In this letter, Ronald alleged that Michael had paid Petitioner $32,000.00 to handle his (Ronald's) original case, and that an additional $25,000.00 was subsequently paid to Petitioner "to handle Michael's and my cases, but it was ruled by the judge that [Petitioner] would not be able to represent both Michael and I (sic) because of conflicting interests in the case." Ronald then recited that Petitioner had requested an additional fee of $5,000.00 (which Ronald could not afford) to pursue an appeal in the second case and, opining that the sum paid Petitioner should have been sufficient to cover the appeal process, requested that Judge Ackerman either appoint Petitioner to represent Ronald on appeal or, failing that, that he appoint a public defender to do so. After receiving a letter from Petitioner requesting that someone else be appointed to handle Ronald's appeal, the trial judge entered an order on May 12, 1983. This order recited that the Court was

unaware of the allegations of payment to Petitioner for representing Michael when Petitioner "had to withdraw in that case" and, after reaffirming the appointment of Petitioner to represent Ronald on appeal and expressing his disinclination to approve payment of any fees on the basis of Ronald's indigency, undertook to explore "the philosophical and ethical problems swimming close to the surface of these alleged facts." To accomplish that purpose, the Court scheduled a show-cause hearing to consider "what, if any, sanctions are proper and within the Court's discretion under the circumstances stated herein." The basis of the District Court's exercise of jurisdiction in this matter is unclear.

The hearing called for by this order was held on June 9, 1983. At the hearing, Ronald testified that his representation by Petitioner was arranged by Michael. Ronald testified that total of approximately $57,000.00 had been paid to Petitioner: $32,000.00 for the first case, and an additional $25,000.00 when the second indictment was returned. (Of this sum, a total of $37,500.00 in cash and credits was paid to Petitioner's partner, Donald Gibson.) He acknowledged, however, that he had never personally discussed the fee arrangements with Petitioner, and that he had never been present when any discussion between Petitioner and Michael took place and that all of his information concerning the subject came from Michael. Notwithstanding the statement contained in his letter to Judge Ackerman that the second payment to Petitioner was for representation of both himself and his cousin, he testified that in February, 1983, Michael had told him: "That he had paid fifty seven thousand to - - for counsel for me, and - - well, that was all." Ronald opined that the amount paid to Petitioner should cover representation on appeal, "except that I did not know that there was that much involved in the appeal of a case." He acknowledged that, during the period from September to December, 1981, he had met with Petitioner and his partner, Donald Gibson "at least ten times" and eight to ten times following his second indictment, the meetings often lasting "for a couple days." He acknowledged that Petitioner and Gibson were both in the Springfield, Illinois area during the entire period from September 8-14, 1981, and admitted that he had no reason to doubt the presence of Gibson on the 24th of September of that year. When asked whether he considered that a fee in the amount of $50,000.00, plus expenses would have been unreasonable in connection with the first charges against him, he replied: "Considering what could have happened,

no, I don't." It should be noted in this connection that Ronald, in his letter of April 11, 1983 to Judge Ackerman, stated with respect to the initial charges filed against him that Petitioner "represented my case expertly and to my satisfaction."

Michael Strawser testified that the total of $57,500.00 paid Petitioner was comprised of the following: cash payments of $25,000.00 plus bond money in the amount of $7,500.00, in connection with the original case against Ronald, followed by additional cash payments totaling $20,000.00, and the cancellation of a personal debt from Gibson in the amount of $5,000.00. Michael acknowledged that some of the cash payments were made directly to Gibson in connection with some sort of "financial projects" which were beyond the knowledge of Petitioner and that he had subsequently on many occasions accused Mr. Gibson of having stolen money from him. Michael testified that all of the money so paid was derived from narcotics dealings.

Michael testified that the second $20,000.00 was paid "when I was indicted," and that he felt he should have been entitled to a refund when it was determined that Petitioner could not represent him. He admitted that Petitioner had offered him a written fee contract concerning his case, but testified that he had declined this because the amount was too high; rather, he stated that he and Petitioner had reached an oral agreement for Petitioner to represent him for a fee of $30,000.00, toward which the $25,000.00 previously paid was to be credited. He acknowledged, however, that he had requested that the Magistrate appoint an attorney to represent him. (Notwithstanding his testimony to the effect that a portion of the questioned payments were for his own representation, the record reflects no objection on Michael's part when Petitioner entered his appearance as counsel for Ronald only.)

Michael admitted that he felt responsible for securing representation for Ronald, and that this objective was his first priority. He further admitted that no fee was either paid or agreed to with respect to the second case prior to Petitioner's entry of his appearance on Ronald's behalf and that he had not considered this aspect when testifying as to his claim of entitlement to a refund, although he subsequently testified that he felt Petitioner should have represented Ronald in the second case without remuneration. In the same vein, although he testified that Petitioner's request for an additional $5,000.00 for handling Ronald's appeal was unreasonable, he acknowledged that he had only assumed that the

fee paid for handling Ronald's case would cover an appeal. He admitted that an hourly fee of $50.00 was unreasonable, and stated that he would have no objection to Petitioner's fee if justified by the number of hours spent on the case. He declined to contradict Petitioner's representation that a total of some 800 hours had been devoted to the case, although he testified it "seems like a lot of time."

Petitioner represented to the court that he had charged a fee of $50,000.00 plus expenses for representing Ronald in the original case and that he had undertaken to represent Ronald in the second case without further charge as a matter of moral obligation, even though the original fee was never fully paid. He stated that he and his partner, Gibson, had logged a total of 800 hours in connection with the cases, and that they involved approximately $7,500.00 in direct expenses. He stated unequivocally that he had never reached a fee agreement for representing Michael, inasmuch as the contract calling for such a fee was never executed.

At the time of the hearing, the trial court expressed its concern regarding Petitioner's having "in effect bankrupted these people so they could file an affidavit of indigency." Consistent with this feeling, the court in its Memorandum Opinion of January 17, 1984 found that the fee paid Petitioner by Michael for representing Ronald was "exorbitant and unreasonable" and that the United States Treasury was thereby affected (Memorandum, p. 6;). The Court further found that, since the fee was derived from drug sales, the "excessive payments may eventually find their way to the United States Treasury as a result of a forfeiture proceeding." The Court accordingly ordered Petitioner to reimburse the treasury in the amount of $1,582.50 (the amount paid court-appointed counsel for Michael), and the sum of $25,117.50 (representing the amount, after deducting the amount of Michael's attorney's fee, by which Petitioner's fees was deemed to be excessive) "pending the outcome of forfeiture proceedings." The Court concluded: "After payment of these amounts, attorney Anderson will be left with $20,000.00 as his fee in this case, which the Court considers a generous compensation under these circumstances." From this opinion and order, Petitioner appealed to the U.S. Court of Appeals for the Seventh Circuit, which affirmed the judgement of the trial court on September 10, 1986. Petitioner's Motion for Rehearing was denied by the Court of Appeals on October 30, 1986.

QUESTIONS PRESENTED

I. Whether the District Court, in a criminal case before it, had jurisdiction to order, pursuant to a summary proceeding instituted on the Court's own motion, defense counsel to make restitution of a portion of a fee charged and paid for representation of Defendant in an entirely different proceeding which was not before the Court at that time.

II. Whether the lower courts abused their discretion in finding, pursuant to a summary proceeding, an attorney's fee to be excessive, and in ordering and upholding restitution to the Court of a portion of said fee.

REASONS FOR GRANTING THE WRIT

I. Petitioner Richard Anderson respectfully submits that the District Court herein exceeded the lawful limits of its jurisdiction and authority in ordering him to make restitution of that portion of an attorney fee found by the District Court to be excessive. Petitioner places primary reliance in advancing this contention on the ruling of the U.S. Court of Appeals for The Seventh Circuit in *U.S. V. Vague,* 697 F.2d 805 (7th Circ. 1983) which held that a trial judge "exceeded his power when he ordered [an attorney] to make restitution . . . ." (id., 1.c. 805). This decision is germane to many aspects of the case at bar, and accordingly will be cited throughout this presentation.

The first question which presents itself in the case at bar concerns the scope of the inquiry undertaken by the District Court. Rule V(A) of the U.S. District Court for the Central District of Illinois provides as follows:

> "When misconduct or allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney admitted to practice before this Court shall come to the attention of a Judge of this Court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these rules, the Judge shall refer the matter to counsel for investigation and prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropritate."

The "complaint or otherwise" that brought the instant matter to the District Judge's attention was the letter of Ronald Strawser of April 11, 1983. The sole issue raised in that letter was: If Petitioner

had been paid a fee of $25,000.00 to represent both Ronald and his cousin, Michael, "but it was ruled by the judge that [Petitioner] would not be able to represent both Michael and I (sic) because of conflicting interests in the case," should that fee be interpreted as extending to Ronald's appeal? Although, as will be hereinafter demonstrated, neither of the premises of this question (i.e., that Petitioner was paid $25,000.00 (or any fee at all, for that matter) for representing both Michael and Ronald in the second case, and that Petitioner was in effect required to withdraw from representation of Michael because of a conflict of interest) is in fact tenable, Petitioner submits that the District Court should have confined itself to that particular issue. It has been observed that judicial authority "does not come into being *in vacuo*." *Pauling v. Eastland*, 288 F.2d 126, 128[1](D.C. Cir. 1960, cert. den. 364 U.S. 900, 81 S. Court 233, 5 L.Ed.2d 194). As applied to a proceeding similar to that in the case at bar, The Seventh Circuit noted in the *Vague* decision: "[W]e think it a mistake to graft onto a lawsuit an issue that the judge is neither asked nor required to resolve." *U.S. v. Vague,* supra, 697 F.2d 1.c. 809.

Unfortunately, the District Court in the case at bar did not so limit his inquiry. In this connection it must be borne in mind that, at the time the District Court set the hearing to inquire as to the propriety of Petitioner's fee and any appropriate sanctions to be imposed upon him, no complaint concerning excessiveness of this fee had been heard from Michael, the individual who paid it, and the only thing approaching a complaint in this regard from Ronald was the following statement in his above-cited letter: "I feel the retainer he [Petitioner] has received is sufficient to handle my appeal." Rather than so limiting himself (curiously enough, the District Court in fact disposed of this matter in his order setting a hearing, by reaffirmating his appointment of Petitioner to represent Ronald Strawser on appeal, and indicating his disinclination to approve payment of any attorney's fees to Petitioner based upon Ronald's indigence) the District Judge launched a full-scale inquiry into what he termed the "philosophical and ethical problems swimming close to the surface of these alleged facts," ostensibly motivated by a desire to thwart the perpetration of fraud upon the treasury by securing reimbursement of public funds expended for representation of Michael, and providing a sufficiently attractive target for anticipated forfeiture efforts. In so doing, Petitioner

respectfully submits, the District Judge grossly exceeded his authority.

The first reason for this conclusion is again to be found with reference to the *Vague* decision. There, the Court of Appeals made the following observation:

> "If he [the trial judge] had not discovered the alleged violation until after he sentenced Vague and thereby terminated the criminal case, the judge could not have ordered [the attorney] to return a portion of the fee. He would have lost jurisdiction over the criminal case and would have had no authority to start a new proceeding against [the attorney]." *U.S. v. Vague,* supra, 697 F.2d 1.c 805[3].

As became perfectly clear in this case, and as the District Court eventually found (Memorandum Opinion, p. 1; Appendix p. 7), the entire attorney fee in question was paid to Petitioner for representing Ronald in the *first* of two criminal cases. *This* case had long been concluded, and it was only the *second* of these cases which was pending before the District Court as the time the inquiry was undertaken. Accordingly, the District Court had no jurisdiction to make the inquiry at all.

The second difficulty concerning the scope of the District Court's inquiry herein derives from the previously mentioned fact that the District Judge resolved the sole issue presented to him in the very order whereby his inquiry was launched. In demonstrating his otherwise commendable solicitude for the integrity of the public exchequer however, the District Judge herein became, in effect, the complaining party. Clearly this inquiry was not motivated by a desire to protect any interest of either Ronald or Michael. It requires no prodigious analytical effort to conclude that the Strawsers, under the circumstances in which they found themselves (i.e., convicted of federal offenses), would likely be able to contain their enthusiasm for augmenting the federal treasury. Accordingly, not only does the district Judge's inquiry herein encompass the very "mixing of judicial and prosecutorial functions" decried by *Vague (U.S. v. Vague,* supra, 697 F.2d 1.c 807) but it violates the District Court's own rules as well. By setting the hearing for sanctions "on its own motion" (Order, p. 2; Appendix, p. 2), the District Judge became a complaining party. Rule V(D) of the District Court specifically provides, however, "that if the disciplinary proceeding is predicated upon the complaint of a Judge of this Court the hearing shall be conducted before a panel of three Judges appointed by the Chief Judge of the Court of

Appeals for this Circuit." In the case at bar, then, by pursuing this inquiry *sua sponte,* the District Judge herein not only discharged the roles of judge and prosecutor in a single hearing, but that of aggrieved party as well. Clearly, this cannot be countenanced.

At this juncture it would seem appropriate to address the lower courts' concerns of potential fraud upon the treasury. This concern focused first upon the fact that Criminal Justice Act funds had been expended for representation of Michael on account of his indigency. Manifestly, the terms of the statute authorize judicial inquiry as to the existence of funds "available for payment from or on behalf of a person furnished representation" pursuant to its provisions. *18 U.S.C. Section 3006A(f).* In the case at bar, the only matter pending before the District Court was the case of Ronald. Under such circumstances, the District Court's inquiry can only be justified under this Act if it can logically be maintained that reimbursement of an excessive fee previously paid by Michael for representing Ronald would perforce result in funds "available" to Ronald for handling his appeal. Clearly, however, this proposition is a *non sequitur.* In *U.S. v. Bursey,* 515 F.2d 1228, 1236[8](5th Cir. 1975) it was held that funds posted for a criminal defendant's bail by a third party were not necessarily "available" for reimbursement of public funds paid for that defendant's attorney's fees. In a case remarkably similar factually to the case at bar, the Second Circuit has squarely held that "funds that have been paid unconditionally to a third party" (in this case, attorney's fees) were not "available" within the meaning of § 3006 A(f)." *U.S. v. Crosby,* 602 F.2d 24, 28[1,2](2nd Cir. 1979). As it happens, the District Court's reliance upon this statute vis-à-vis Ronald was at best pretextual, inasmuch as Petitioner was ordered to (and did) represent Ronald on his appeal to The Court of Appeals without compensation of any kind. Concerning Michael, it would seem a fairly safe assumption that the authority conferred by the above statute extends only to cases actually before the District Court. In the case at bar, Michael's case was not before the Court at all, yet restitution of funds paid for his representation was ordered.

Similarily, the District Judge's concern that Petitioner's allegedly excessive fee "would deprive the United States Treasury of monies properly belonging to it" inasmuch as the funds "may eventually find their way to the United States Treasury as a result of a forfeiture proceeding" (Memorandum opinion, p. 6;

Appendix, p. 11) is equally unavailing as a justification for his restitution order. The forfeiture statute involved, 21 U.S.C. Section 881, permits governmental seizure of "monies . . .furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all monies used or intended to be used to facilitate any violation of this subchapter." In keeping with the generally jaundiced eye with which forfeiture provisions are judicially viewed, this statute must be strictly construed. "Although the government's burden in a civil forfeiture proceeding is not as great as in a criminal context, forfeitures are not favored and Section 881 should be strictly construed in order to mitigate the harshness in a procedure that deprives an innocent person of his property because it was used by other persons for unlawful purposes. *United States v. One 1976 Mercedes Benz 280S,* 618 F.2d 453, 454(7th Cir. 1980)." *U.S. v. One 1981 Cadillac Eldorado,* 535 F.Supp. 65, 66-7[3](N.D. Ill. 1982). Michael candidly admitted that all of the funds used to pay Petitioner's fee were directly derived from drug transactions. By its clear terms, the above statute would authorize forfeiture of either funds derived from such transactions or "proceeds traceable to such an exchange" in the hands of Michael. The fees paid to Petitioner, however, were neither. Once paid, the funds were no longer in the hands of Michael, but became the property of Petitioner, and as such were not subject to forfeiture. The absurdity of any assertion to the contrary is easily illustrated in the context of attorney's fees (although the implications extend to virtually any commercial transaction in which "drug money" might be involved and, in the context of "legal tender," are staggering.) In *Vague* The Court of Appeals expressed its reluctance to grant trial judges *carte blance* to interfere with attorney's fees in criminal cases in the following terms: "The intervention of a federal judge in the fee arrangements between a criminal defendant and his lawyer could reduce the ability of such defendants to obtain the effective assistance of counsel to which the Sixth Amendment entitles them." *U.S. v. Vague,* supra, 697 F.2d 1.c. 808. In view of this legitimate concern, this Court is respectfully invited to contemplate the sequelae of a ruling upholding the instant restitution order on the grounds that funds involved would be subject to forfeiture: No marginally sane attorney would *ever* represent a person charged with narcotic sales for fear that his fee, even if paid by a third party and wholly

unbeknownst to him, might be tainted by its provenance in a drug transaction and thus subject to forfeiture. In this regard, Petitioner wishes to emphasize that he is in no way attempting to limit the judicial authority in forfeiture or CJA proceedings to inquire as to the substance of fraudulent transactions designed to circumvent those proceedings. This authority clearly and necessarily exists, but it is not relevant in the circumstances of the case at bar. Petitioner's fee was charged and paid by Michael long before he and Ronald were "unexpectedly indicted" (Memorandum Opinion, p. 1;). Thus, no such fraudulent motive could possibly have existed in this case. In its absence, the forfeiture rationale becomes illusory.

A further general impediment to the District Court's order of restitution in the case at bar stems from basic constitutional principles. The Fifth Amendment to the U. S. Constitution provides that no person shall "be deprived of life, liberty or property without due process of law. . . ." Although the courts below in this case seem to think that, since Petitioner's fee was excessive, it was not rightfully his and thus subject to the Court's power to order summary restitution, the simple fact is that these funds became the property of Petitioner upon payment, and he could not be deprived of these funds in the absence of a finding, made in accordance with due process principles, that his acquisition of the funds had in fact been improper. Cf. *Geddes v. United Financial Group,* 559 F.2d 557, 561[7](9th Cir. 1977). These due process principles involve such niceties as trial by jury, which the trial court's summary proceeding dispensed with. It has been specifically held that, in cases of allegedly excessive attorney's fees, the "amount of money damages due the aggrieved client from the attorney cannot constitutionally be determined in a disciplinary proceeding, in that to do so would deny the attorney the right to trial by jury." *In Re Ackerman,* 330 N.E. 2nd 322, 324 (Ind. 1975). As observed at the very beginning of this discussion, The Court of Appeals' holding in *Vague* seems to support this proposition.

Finally, one must not overlook the lower courts' attempts to distinguish the *Vague* decision. Beyond the jurisdictional difficulties raised by the fact that the fee involved herein was paid in connection with a case not before the court, which District Judge initially posited that an "actual controversy" existed in the case at bar because "Michael Strawser, the individual who paid the fee complained of the excessive fee and contended that he believed

the $47,500.00 was paid for the representation of both he and Ronald Strawser." (Memorandum Opinion, p. 6; Appendix, p. 11). There are, however, two rather patent difficulties with this statement. The first of these, as has been shown, is that Michael's complaint of the excessiveness of the fee did not surface until he actually testified, long *after* the District Court had set itself in motion to investigate the "actual controversy."

The second difficulty is simply that the entire proposition of the second fee of $25,000.00 (actually, only $20,000.00) for representing both Ronald and Michael in the second case is nothing more than a transparent, after-the-fact concoction of Ronald and Michael, thoroughly contradicted by the admitted facts of the case and wholly unworthy of belief. A few examples are in order. First, Ronald testified that in February, 1983, Michael had told him that the entire sum of some $57,000.00 had been paid "for counsel for me [Ronald]." Second, the record herein reflects not the faintest objection from Michael when, after the second charges were filed, Petitioner entered his appearance for Ronald only, and not for Michael, even though Petitioner had supposedly been paid $25,000.00 for representing both Ronald and Michael. Third, Michael admitted that he had expressed to the Magistrate his need for appointed counsel and requested that Petitioner be appointed to represent him. Is this consistent with Michael's previously having *paid* Petitioner to represent him in that very case? And finally, Michael admitted that the second $20,000.00 was paid to Petitioner *after* he and Petitioner made their supposed oral agreement concerning Petitioner's representation of him. What, then, *was* this $20,000.00 - - a gift? If it was in fact paid for representation of both Michael and Ronald, why would a separate fee agreement with Michael have been necessary? Indeed, if a separate fee for Michael's representation had been agreed upon, why could not the proffered contract have been altered to reflect the agreed fee (and, at that, the *net* fee and not a gross fee with credit for monies previously paid?) Manifestly, the only interpretation consistent with these facts is that advanced by Petitioner - - that the entire sum was paid in connection with his representation of Ronald in the first case only. In fact, the District Judge so found: "Attorney Richard Anderson was paid $45,600.00 in fees and $1,900.00 in expenses by Michael Strawser to represent Ronald Strawser in a drug case in this court." The District Judge proceeded to refer to the second case in which Ronald (and Michael

as well) were "unexpectedly indicted." (Memorandum Opinion, p. 1; Appendix, p. 11). In view of Ronald's assertion in his letter of April 11, 1983, to the effect that Petitioner had represented him "expertly and to [his] satisfaction" in that first case and his express testimony that the fee arrangement of $50,000.00, plus expenses was not unreasonable, Petitioner respectfully submits that no "actual controversy" in this case existed.

The only other grounds asserted by the District Court herein for distinguishing *Vague* concern supposedly adverse effects upon the treasury resulting from payment of Michael's counsel fees and the absence of funds for the exercise of forfeiture powers. The fallacy of these arguments has been previously demonstrated herein. The Court of Appeals, in finding a "solid foundation" for the District Court's action, distinquished the *Vague* case thus: "If Anderson owed Michael a refund because the conflict prevented performance of the service [i.e., representation of Michael in the second case], the refund, if collected, would be reimbursable to the Treasury under 18 U.S.C. § 3006(A)(f)." (Opinion, p. 6; Appendix, p. 11) the District Court, however, found that the entire fee was paid for representation of Ronald in the first case, and Petitioner respectfully submits that the inquiry should have ended at that point. Accordingly, Peititioner respectfully submits that the decision in the *Vague* case is fully applicable to the case at bar, and requires reversal of the restitution order herein.

II. Petitioner respectfully submits that, assuming (arguendo) that the District Court had jurisdiction to consider the amount of Petitioner's fee for representing Ronald in the initial case, both the District Court and The Court of Appeals abused their discretion in finding that fee excessive. Inasmuch as the Court of Appeals declined to consider in detail the factors applicable to this finding, Petitioner's focus herein will be upon the ruling of The District Court.

The District Court Rules specifically incorporate the Illinois Code of Professional Responsibility in the applicable standards for professional conduct (Rule IV(B), Appendix, p. 20). As a general proposition, under Illinois law contracts calling for payment for legal services are not distinquishable from any other type of contract. *Sokol v. Mortimer,* 81 Ill.App.2d 55, 225 N.E.2d 496 (1967). It has been held that, in the absence of fraud or excess, an express contract between an attorney and client "will control the amount of compensation due the attorney from the client, and

quantum meruit principles are not involved . . ." *People v. Kinion,* 454 N.E.2d 625, 629-30[4](Ill. 1983.) As to what constitutes an excessive fee, the Illinois Code of Professional Responsibility, Rule 2-106(b) provides: "A fee is excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." Stated somewhat more artfully:

> "It would be unthinkable to condemn a demand or charge as unethical merely because it exceeds another's judgment of what is fair. The touchstone is moral turpitude . . . it therefore is not enough that a charge is excessive or unreasonable, rather it must be such to a degree which compels the finding that the attorney intended to overreach." *In RE Quinn,* 25 N.J. 284, 289, 135 A.2d 869, 872 (1957).

Finally, advertence should be made to certain evidentiary matters. "In a disciplinary proceeding [which this case is, in essence], all proper intendments are in favor of the attorney, and reasonable doubts or conflicts in the evidence should be resolved in his favor." *7A C.J.S., Attorney and Client,* Section 102. Although the District Court herein purported to accept this principle, it can hardly be reconciled with the substance of his ruling.

The primary criterion employed by the District Court in judging Petitioner's fee was Rule 2-106 of the Illinois Code of Professional Responsibility. That provision contains several specific guidlines to be applied in reaching the ultimate determination. The first of these involves "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." On this score, the District Judge opined: "The time and labor required to plead Ronald Strawser guilty should not have been extraordinary." The court noted that it had not "found any difficult or novel questions in the case" and, adverting to the strength of the government's evidence including, inter alia, a "video tape of Ronald Strawser loading marijuana into a van," the court opined: "It was obvious at an early stage of both Ronald Strawser's cases that he would plead guilty rather than go to trial." (Memorandum Opinion, p. 3; Appendix, p. 9). The District Court then undertook a patently invidious comparison of the time devoted to the case by Petitioner and his co-counsel to the "75 hours of billable time" expended by court appointed counsel for Michael in the second case, which the court gratuitously stated was "much more difficult than Ronald's case because Michael was charged in multiple counts and was exposed to a much greater

prison sentence." (Memorandum Opinion, p. 3-4; Appendix, p. 9). Petitioner respectfully submits that these assertions are erroneous. Considering the last of these elements first, Petitioner would point out that the District Court overlooked the fact that Petitioner's office is three or four hundred miles from the venue of this case, whereas that of the court appointed attorney for Michael obviously was not. Moreover, Ronald was, in fact, charged with multiple counts in the first indictment returned against him. As for the time expended, Petitioner stated that he and his co-counsel had devoted in excess of 800 hours in this matter (to be exact, 857 hours) and this total did not include time spent handling Ronald's appeal in the second case. Neither Petitioner's client, Ronald, nor Michael, who paid the fee, disputed this statement, although the latter was expressly invited to do so. It seems fairly safe to assume that the principals in the case would have a much better idea of how much time their attorneys devoted to it than would the District Court. Nonetheless, the District Judge in this case, heedless of his stated intention to afford Petitioner the benefit of every doubt in the evidence, proceeded to find the estimate of time spent "inconceivable" (Memorandum Opinion, p. 5; Appendix, p. 10), based upon his purely stochastic assessment of the situation. The Court of Appeals similarly opined that this time estimate "seems preposterous" (Opinion, p. 8; Appendix, p. 12) although this speculation finds no evidentiary support in the record.

The District Court's analysis of the second factor, "the likelihood that the acceptance of the particular employment would include other employment by the lawyer", is likewise flawed. In this context the District Court observed that Petitioner "submitted no evidence that Ronald Strawser's case was likely to preclude other employment. He makes the naked and unsupported contention that he had to relinquish the opportunity to represent others, but any representation causes one to relinquish other opportunities." Then, without pausing to catch his judicial breath, the District Court continued with a recitation of a simply astounding assertion which he had made previously: "Because it was readily apparent that Michael (sic) Strawser was not going to trial in either case and the cases against him were not complex, it is unlikely that attorney Anderson would have had to turn down other employment." (Memorandum Opinion, p. 4; Appendix, p. 9). If the statement that "it was readily apparent that Michael (sic) Strawser was not going to trial in either case," does not qualify as a "naked and

unsupported contention", instant counsel candidly confesses that he does not know what does. Hindsight begets oversimplification, and the existence of video tapes does not guarantee a conviction. Petitioner and his co-counsel were absent from their offices at one point for six solid days in handling Ronald's case, and no one can say with assurance what opportunities were precluded by that absence.

Considering the next factor, "the fee customarily charged in the locality for similar legal services", the District Court found that Petitioner's fee "grossly exceeds the fee charged for similar services in this community. When the fees for Michael (sic) Strawser's co-defendants are examined, attorney Anderson's charges have an additional character of unreasonableness. Of the defendants who went to trial, the highest fee was $12,000.00." The court then proceeded to conclude that Petitioner's fee was unreasonable. (Memorandum Opinion, p. 4; Appendix, p. 9). The only evidence on which this conclusion was based consisted of two affidavits and one letter submitted by the U.S. Attorney's office.

With the exception of one affidavit, which reflected an actual expenditure of 200 hours, none of these documents considered the criteria set forth in Rule 2-106. Similarly, none even purported to reflect what "customary" charges for similar services might be. Accordingly, these documents (all, of course, being blatant hearsay) are of no probative value whatever. It is, however, instructive to note that one local attorney spent 200 hours on one case. In view of this, Petitioner's assertion that *two* attorneys, both of whom resided far from trial venue, spent 800 hours on *two* separate cases does not seem quite so "inconceivable" as the lower courts suggested. In short, Petitioner submits that the "evidence" in this case justifies no conclusion whatever in this connection. Even if it had justified the conclusion reached by the lower courts, Petitioner would respectfully impugn the validity of that conclusion on the basis of the Constitutional irrelevance of the factor involved. Subject to certain limitations, it is recognized under Illinois law that: "A defendant's right to assistance of counsel . . . includes the right to assistance of counsel of his choice." *People v. Dorsey*, 109 ILL. App. 3d 218, 440 N.E.2d 394, 400[6](1982), cert. den., 103 S.CT. 1503. The above mentioned limitations do *not* include any requirement that the attorney so chosen conform his fee arrangements to custom prevailing in the venue in question. Without belaboring the point, Petitioner would point out that

similar reservations concerning the anti-trust implications of the local fee restriction were adverted to in the cogent dissent filed in *In Re Kutner,* supra.

Concerning the fourth factor, "the amount involved and the results obtained", the District Judge observed that Petitioner's fee was not justified by the "result obtained," and that he "set his fee before he had obtained any results and his main function was to negotiate as favorably for his client as possible. The plea agreement was a rather routine and ordinary result in this case." (Memorandum Opinion, p. 4; Appendix, p. 9). As to the "amount involved", it was previously observed that Ronald was initially charged in three counts of his indictment, and apparently was exposed to a maximum punishment of 25 years in prison and $155,000.00 in fines. "In criminal cases, responsibility may ultimately encompass . . . whether a client will lose his liberty for a number of years or for life or receive the death penalty if convicted. An attorney's responsibility to these clients should not be forgotten when setting the fee." Kadish and Brofman, *Criminal Law Advocacy,* Vol. I, paragraph 3.01 (New York: Matthew Bender, 1983). Ronald eventually received a sentence of probation in connection with all these charges. While the District Court herein may not have thought that a particularly favorable result, it is quite clear that Ronald did. When asked whether *he* thought a fee of $50,000.00 plus expenses would be unreasonable in connection with the first charges he responded: "Considering what could have happened, no, I don't."

As for the fifth factor, "the time limitations imposed by the client or by the circumstances", the District Court concluded: "This case imposed very few, if any, time limitations. Plea agreements were negotiated shortly after the indictment, and . . . conferences with Ronald Strawser and the Government attorneys could be scheduled at convenient times. A great deal of work in this case could have been performed when attorney Anderson was not required to pursue other work." "Time is the most valuable asset of a lawyer. Without time his expertise and skill are of no value. But it is a depletable asset. Once is is used up the lawyer's inventory of legal services have been exhausted." American Bar Association Committee on Economics of Law Practices (Ed.) (St. Paul, Minnesota: West Publishing Co., 1962). The impositions upon Petitioner's time arising from travel alone are significant in this case, as has been previously mentioned. Under these circumstan-

ces, one wonders precisely how convenient a conference with government attorneys might be when it necessarily involves a 300 to 400 mile trip (one way). With the exception of actual in court time, fixed by judicial calendars and schedules, the statement that a great deal of the work in the case "could have been performed when [Petitioner] was not required to pursue other work" rings hollow.

The District Court's consideration of the sixth factor, "the nature and length of the professional relationship with the client," is similarly flawed. He states that this factor should call for a "lesser, not greater, fee." "There is no indication that [Petitioner] had been [Ronald's] attorney in the past, and it is not likely that Ronald Strawser will utilize his services in the future. Both of the cases virtually were concluded with the plea agreements entailing an active attorney-client relationship of about four months. Essentially this was a brief attorney-client relationship." (Memorandum Opinion, p. 5; Appendix, p. 10). While the factual references contained in this passage may be accurate, the conclusions drawn by the District Court from these facts defy logic. It hardly makes more sense for an attorney to discount a fee to a client he knows he will represent on an eposidic basis as opposed to a well-established, long term client.

Vis-à-vis the seventh factor, "the experience, reputation, and ability of the lawyer or lawyers performing the services," the District Court concluded that "this was a routine case that was handled by an attorney who rendered average services." (Memorandum Opinion, p. 5; Appendix, p. 10). A "routine case" it manifestly was not. The considerable amount of publicity generated by the initial case against Ronald demonstrates that it was something of a *cause celêbre.* While the District Judge might have felt that the case involved only "average services" it is worthwhile to note that the client involved, Ronald felt that the Petitioner had represented him in that case "expertly and to [his] satisfaction."

The final factor mentioned in the code is "whether the fee is fixed or contingent." Inasmuch as the code (Rule 2-106(c)(4)) specifically proscribes contingent fee arrangements "in respect of the representation of the defendant in a criminal case", the District Court did not include this factor. Petitioner, however, feels it is worth mentioning for two reasons. First, it might be recalled that in dealing with the fourth factor the Court noted that Petitioner had "set his fee before he had obtained any result . . ."

In view of the above proscription, one wonders as to the ethics of the practice of setting one's fee after results have been obtained in a criminal case. The second reason for considering this proscription is the fact that it in effect forces attorneys to gamble in criminal cases. The gamble is not on the outcome of the case, but rather on whether the fee the attorney fixes will justly compensate him for the effort the case requires. In fixing a fee, Petitioner had to consider such factors as the location of his office 300 to 400 miles from the place of trial, the amount of publicity generated by the case, and its potential complexities. He could not know at that time what evidence the government's case involved. While it may be true that an unremarkable number of routine motions were filed in the case, the District Court can have no way of knowing how much research was done on matters which were never brought to the Court's attention, or how much investigative work the case entailed. The fee Petitioner set had to cover his efforts in the event of anything from a voluntary dismissal to an extended trial, and he did not have the benefit of the hindsight so consistently employed by the District Court throughout its opinion herein. Petitioner respectfully submits that he earned his fee in its entirely when he stood "ready, willing, and able" to represent Ronald throughout a trial, regardless of whether that trial, in fact, took place. Cf. *O'Hair v. Watson,* 202 Ill. App. 439 (1916).

Finally, one further consideration should not escape the attention of this Court (as it did that of the lower courts): A substantial portion of the representation of Ronald, at least with respect to the initial case, involved the efforts of *two* attorneys -- both Petitioner and his partner, Don Gibson. Accordingly, the fee charged would necessarily encompass the efforts of Mr. Gibson as well as Petitioner. Similarly, when the District Court observed that its restitution order would leave Petitioner "with $20,000.00, as his fee in this case which the Court considers a generous compensation under the circumstances" (Memorandum Opinion, p. 7; Appendix, p. 11) it overlooked the fact that most ($37,500) of the total fee paid by Michael was in fact paid to Petitioner's co-counsel, Gibson. The restitution order herein leaves Petitioner with a fee of nothing, which is not "generous" by anyone's reckoning.

APPENDIX

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IN THE UNITED STATED DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS —
FIELD DIVISION
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	No. 83-30067
	)	
RONALD STRAWSER,	)	
	)	
Defendant.	)	

ORDER

Defendant has requested that Attorney Richard L. Anderson, who represented him in this Court, be appointed to represent him on appeal. A copy of his request is attached hereto. Attorney Anderson, on the other hand, requests that he not be appointed and asks the Court to appoint other counsel for Defendant on appeal. That letter is also attached. Defendant's correspondence indicates that some $57,000 was paid to Attorney Anderson. Defendant pled guilty to two separate indictments. According to Defendant's correspondence, a portion of the money paid to Attorney Anderson was for the representation of Michael Strawser, a relative of Ronald Strawser. When Attorney Anderson had to withdraw as counsel in that case, this Court appointed other counsel for Michael Strawser, unaware at that time of the allegation that a substantial amount had already been paid to Anderson.

Since Attorney Anderson's request, if granted, would require the Court to expend public funds for appointed counsel, this Court feels impelled to make inquiry into the facts and consider the philosophical and ethical problems swimming close to the surface in these alleged facts.

First, the Court makes no determination as to the validity of the allegations in Defendant Strawser's letter. However, under these circumstances, the Court had declined and does again hereby decline to appoint new counsel for appellant and to indicate any inclination to approve fees for appellant Strawser as an indigent. In short, the appointment of Richard L. Anderson for Defendant on appeal is reaffirmed.

The Court, on its own motion, sets for hearing the question of what, if any, sanctions are proper and within the Court's discretion under the circumstances stated herein. The first question is whether the facts stated in Ronald Strawser's letter regarding the attorney's fees paid are correct. The Court has reviewed a partial transcript of the sentencing hearing in *United States v. Michael Strawser,* No. 83-30067, dated January 27, 1983, which seems to corroborate the allegations of fact. If the allegations are found to be true, the Court will then consider what, if any, action should be taken in these circumstances. In this connection the parties' attention is directed to *United States v. Vague,* 697 F.2d 805 (7th Cir. 1983). Although the Court will consider any appropriate sanction, counsel are directed to consider (1) whether an order could and should be entered upon counsel to return all or part of the fee; (2) whether counsel should be ordered to reimburse the Government for all or a portion of the fees paid to Michael Strawser's court-appointed attorney; (3) whether contempt would and should lie in these circumstances; and, (4) any other appropriate relief.

Clerk is directed to set matter for hearing and give notice to counsel.

Enter this 12 day of May, 1983.

J. Waldo Ackerman
Chief U.S. District Judge

RICHARD L. ANDERSON

Attorney at Law

P.O. Box 612
Country Club Center
Kimberling City, Mo. 65686 TELEPH: 417-739-4286

April 22, 1983

Honorable J. Waldo Ackerman, Judge
United Stated District Court
Central District of Illinois
United States Courthouse
6th and Monroe
Springfield, ILL 62701

Re: United States of America vs. Ronald Strawser
No. 82-CR-30067
Appeal No. 83-1251

Dear Judge Ackerman:

I want to apologize for apparently being unclear in my motions filed requesting the defendant Ronald Strawser be appointed counsel on appeal, in that you may have thought that I wished to be appointed myself. I understand that probably most attorneys do not enjoy being appointed to handle appellate cases and that it may be difficult to find someone willing to take the case, but if at all possible I would certainly appreciate it if someone else could be appointed.

The reasons I would request someone else be appointed are primarily the practicalities involved in my having to meet filing deadlines in Chicago, and in my having to travel to Chicago for oral argument on the appeal. I am unfamiliar with the standards for the briefs which must be submitted so far as printing and I am sure a local attorney in Chicago would be aware of printers who could handle this easily. I really feel that the defendant deserves to have someone represent him on the appeal who is more familiar with the requirements of the Court of Appeals in Chicago. Would you please ask your secretary to call and let me know whether some other attorney has been appointed since I will have to spend con-

siderable time familiarizing myself with the applicable rules in the event I must handle the case?

Sincerely yours,

Richard L. Anderson

RLA:ja

April, 11, 1983

The Honorable J. Waldo Ackerman
U. S. District Judge
P. O. Box 315
Room 306
Federal Building
Springfield, Ill.
62705

Dear Judge Ackerman,

I am writing this letter today, being advised by Public Defender, Dan Scott, Mpls, Mn. to ask for your help in the case that follows:

This is a brief outline of my situation. On September 1st, 1981 I was arrested in Springfield, Illinois in a case called the Andrews Case. At that time Richard L. Anderson was retained for my defense by Michael Strawser for a fee of $32,000. Mr. Anderson represented my case expertly and to my satisfaction. 5 months later I was indicted again from the same case. At the same time Michael Strawser was indicted. At that time Michael Strawser paid Richard an additional $25,000 to handle Michael's and my cases, but it was ruled by the judge that Richard would not be able to represent both Michael and I because of conflicting interests in the case. Richard then handled my case. I asked Mr. Anderson how much my defense would cost and he stated that it was taken care of.

I signed a guilty plea and it is going before the appeals court. The motion for appeal was filed before my signing a guilty plea by my attorney, Richard Anderson. I was sentenced, and am now out on an appeal bond. At the end of February I was told by Richard Anderson to send $70 for the docketing fees. At the end of March (two weeks before the brief has to be handled for the appeal) which is April 16, 1983, Richard has now informed me that he wants an additional $5,000 fee.

What I would like to know now is, would it be possible to have Richard Anderson appointed as my Public Defender, or could it be suggested to him that he finish my case? I feel that the retainer he has received is sufficient to handle my appeal. If this is not possible I will need a Public Defender appointed for me, as I cannot afford the $5,000.

I greatly appreciate your help and am anticipating your reply. I am sending a copy of this letter to the 7th Circuit Court of appeals in Chicago.

Sincerely,

Ronald A. Strawser

Appeal Case # 83-1251
District Case # 82-30067
Docketing Date February 28, 1983

IN THE UNITED STATED DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS —
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	No. 83-30067
	)	
RONALD STRAWSER,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

On May 12, 1983, Attorney Richard Anderson was ordered by the Court to show cause why sanctions should not be imposed or why he should not be ordered to refund fees and costs paid him in this case. The facts causing the Court to issue this show cause order have been set out with great detail in the Government's brief. The Court has thoroughly reviewed these facts, and it is not necessary to repeat them here. Thus, I adopt the Government's description of the facts, with the following exception: Attorney Michael Kopec was paid $1,582.50 for his initial representation of Michael Strawser.

This case presents a difficult question involving fees of a lawyer in drug cases and what, if anything, this Court should or may do under these circumstances. To be fair to counsel, I take the salient facts, though disputed, in the light most favorable to him. Even so, those facts do not present a favorable picture of what generally is and always should be an honorable profession.

Attorney Richard Anderson was paid $45,600 in fees and $1,900 in expenses by Michael Strawser to represent Ronald Strawser in a drug case in this Court.[1] A plea agreement was negotiated shortly after indictment and Ronald Strawser received probation. Ronald Strawser was unexpectedly indicted a second time and represented by Attorney Anderson. Once again he pled guilty and was sentenced to one year. He preserved a double jeopardy for appeal.

After Michael Strawser paid $47,500 for his cousin's defense, he was indicted. Because he had no money, he prepared, with

Attorney Anderson's assistance, a financial affidavit and obtained court appointed counsel. The financial affairs of Michael Strawser were not known or made known to the Court at the time.

The facts regarding the fees of Attorney Anderson came to the Court's attention when Anderson wrote that Ronald Strawser was indigent and needed appointed counsel on the double jeopardy appeal. This led to communications from the Strawsers which, in turn, led to this proceeding.

Although the Court primarily basis its authority to conclude that this fee is excessive on its responsibility to insure the federal treasury is not defrauded, the Illinois Code of Professional Responsibility provides a standard for examining the propriety of fee amount. Rule 2-106 of the Illinois Code of Professional Responsibiliy provides:

> Rule 2-106. Fees for Legal Services
>
> (a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or excessive fee.
>
> (b) A fee is excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood that the acceptance of the particular employment would preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and,
>
> (8) whether the fee is fixed or contingent.

The time and labor required to plead Ronald Strawser guilty should not have been extraordinary. Ronald was charged with two fairly routine drug cases. The Court has not found any difficult or novel questions in this case, and Attorney Anderson has not directed the Court's attention to any such problems. There were very

few motions filed, and those filed were of the boilerplate variety. It was obvious at an early stage of both Ronald Strawser's cases that he would plead guilty rather than go on trial. The evidence of the government left him with little choice. In 81-30045, the Government's evidence included, among other things, video tape of Ronald Strawser loading marijuana into a van. Ronald negotiated a plea of guilty on September 16, 1981, two weeks after he had been charged in a criminal complaint. A liberal estimate of Attorney Anderson's in-court time would be twenty hours. An examination of the motions filed in this case indicates that twenty hours might have been used in research and preparation of motions.

There were similar discrepancies with Attorney Anderson's charges in Ronald Strawser's second case. Without going through case 82-30067 in great detail because the record speaks for itself, Attorney Anderson's time charges can be analyzed by comparing the time spent by codefendant's counsel. Michael Strawser was represented by Michael A. Kopec. Attorney Kopec performed in a professional manner. Michael Strawser's case was much more difficult than Ronald's case because Michael was charged in multiple counts and was exposed to a much greater prison sentence. Even though Michael's case was more difficult, Attorney Kopec negotiated a plea using seventy-five hours of billable time.

Attorney Anderson has submitted no evidence that Ronald Strawser's case was likely to preclude other employment. He makes the naked and unsupported contention that he had to relinquish the opportunity to represent others, but any representation causes one to relinquish other opportunities. Because it was readily apparent that Michael Strawser was not going to trial in either case and the cases against him were not complex, it is unlikely that Attorney Anderson would have had to turn down other employment.

Attorney Anderson's fee grossly exceeds the fee charged for similar services in this community. When the fees for Michael Strawser's codefendants are examined, Attorney Anderson's charges have an additional character of unreasonableness. Of the defendants who went to trial, the highest fee was $12,000. Considering all of the fees charged and the work performed by the various attorneys, the Court can draw no conclusion except that Attorney Anderson's fee was unreasonable.

The result obtained in this case does not warrant the unusually high fee. Attorney Anderson set his fee before he had obtained

any results, although he may have realized that a negotiated plea was his client's most sensible option. The counsel's main function was to negotiate as favorably for his client as possible. The plea agreement was a rather routine and ordinary result in this case.

This case imposed very few, if any, time limitations. Plea agreements were negotiated shortly after indictment, and Attorney Anderson's requests for continuances were routinely granted. His conferences with Ronald Strawser and the Government attorneys could be scheduled at convenient times. A great deal of the work in this case could have been performed when Attorney Anderson was not required to pursue other work.

The nature and length of Attorney Anderson's client relationship indicate Ronald Strawser should have been charged a lesser, not a greater, fee. There is no indication that Attorney Anderson had been his attorney in the past, and it is not likely that Ronald Strawser will utilize his services in the future. Both of the cases virtually were concluded with the plea agreements entailing an active client attorney relationship of about four months. Essentially, this was a brief attorney-client relationship.

This case required a lawyer of ordinary ability and experience and Attorney Anderson, while he has had ample opportunity to outline his credentials, has not shown that he possesses extraordinary ability and experience. The Court, under no circumstances, wishes to imply that Attorney Anderson was incompetent. Rather, this was a routine case that was handled by an attorney who rendered average services.

Anderson received $47,500 for negotiating two fairly simple guilty pleas. It is inconceivable, and the Court does not accept counsel's assertions to the contrary, that a competent attorney could utilize 800 hours on this representation. Accordingly, the Government had to pay for Michael Strawser's representation because Anderson charged Ronald Strawser an exhorbitant and unreasonable fee. Such a practice might reasonably be viewed as a fraud on the Treasury of the United States which this Court refuses to condone. In short, receiving $47,500 for two guilty pleas and aiding the person paying the fees in obtaing the in forma pauperis appointment of counsel to be paid from tax funds shocks this judicial conscience.

While Attorney Anderson relies heavily on *United States v. Vague,* 697 F.2d 805 (7th Cir. 1983), that case is clearly distinguishable from the current controversy. In *Vague,* no one

complained about the attorney's fees. In this case Michael Strawser, the individual who paid the fee, complained of the excessive fee and contended that he believed the $47,500 was paid for the representation of both he and Ronald Strawser. Hence an actual controversy exixts in this case - a controversy that the *Vague* Court perceived as being absent in that case. In this case the United States Treasury was effected because Michael Strawser required appointed counsel after he paid the excessive fee charged Ronald Strawser. As a result of Attorney Anderson's fee, the Govenment had to pay for Michael Strawser's defense. The Government would not have been required to undertake this burden if Attorney Anderson would have charged a reasonable fee.

Additionally, excess fees charged by Attorney Anderson would deprive the United States Treasury of monies properly belonging to it for another reason. Michael Strawser testified that the monies paid Attorney Anderson were the receipts of drug sales. These excessive payments may eventually find their way to the United States Treasury as a result of a forfeiture proceeding. A convicted drug dealer should not be allowed to pay an excessive, unethical fee with drug profits and thereby deprive the Government of its rightful penalty. Such a shelter is indistinguishable from a drug dealer being allowed to insulate his profits from Government forfeiture by making a gift to a friend.

Considering all the facts, including the fact that this Court required Attorney Richard Anderson to handle the appeal of Ronald Strawser without further payment, the Court orders that Attorney Richard Anderson reimburse the sum of $1,582.50 to the Treasury of the United States, this being the amount paid to court appointed counsel for Michael Strawser, and the sum of $25,117.50 to the Treasury of the United States pending the outcome of forfeiture proceedings. After payment of these amounts, Attorney Anderson will be left with $20,000 as his fee in this case which the Court considers a generous compensation under the circumstances.

Enter this 17 day of January, 1984.

J. Waldo Ackerman
Chief U.S. District Judge

[1] Michael Strawser claims he paid $52,500 for Attorney Anderson's representation. For the purposes of my analysis of this case, I have utilized the $47,500 amount. The evidence submitted in this case supported the larger amount at least as well as it did the smaller amount.

In the

Unites States Court of Appeals

For the Seventh Circuit

No. 84-1367

United States of America,

Plaintiff-Appellee,

v.

Ronald Strawser,

Defendant,

Appeal of Richard L. Anderson,

Respondent-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division
No. 82 CR 30067—**J. Waldo Ackerman,** *Judge.*

Argued February 26, 1985—Decided September 10, 1986

Before POSNER and FLAUM, *Circuit Judges,* and FAIRCHILD, *Senior Circuit Judge.*

FAIRCHILD, *Senior Circuit Judge.* This is an appeal by Attorney Richard Anderson from an order requiring him to disgorge the excessive portion of an attorney's fee collected for representation of a defendant in criminal proceedings.

Michael and Ronald Strawser are cousins. Michael lived in Tulsa, Oklahoma, and Ronald in Anoka, Minnesota. In 1981, they participated in the distribution of marijuana, obtained from locations near Andrew and Edinburg, Illinois (in the vicinity of Springfield). Michael apparently played the more significant role and substantial amounts of the proceeds passed through his hands.

On September 1, 1981, Ronald was arrested (with others) after loading marijuana into a van at the Andrew location. Richard

Anderson and Donald Gibson were law partners at that time, practicing at Kimberling City, Missouri. Michael arranged with Gibson that he and Anderson would represent Ronald. How it was that Michael selected lawyers in southwestern Missouri to represent Ronald in Springfield, Illinois is not indicated in the record.

On September 29, Ronald was indicted with three others. On September 15, however, Anderson had worked out a plea agreement under which Ronald would receive probation. Ronald supplied very significant information to the government.

Michael paid Gibson and Anderson sums totalling $52,500 according to Michael, $47,500 according to Anderson. There was a dispute whether all this money was for representation of Ronald. The money was proceeds of marijuana sales.

In early December, 1981, as the trial date approached, there was a bobble in the informal plea agreement, but it was reduced to writing December 28 and Ronald pled guilty to one count. On May 11, 1982 he was sentenced to probation.

In February, 1982, Anderson and Michael began to expect an indictment against Michael, and at least discussed Anderson's representation of Michael. Twenty thousand dollars ($20,000.00) of the money paid by Michael was paid after that time. On August 24, 1982, Michael was indicted on several counts involving 1981 marijuana transactions at Springfield, Edinburg, and Andrew, Illinois. One count of the same indictment charged Ronald with possession, with intent to distribute, of 430 pounds of marijuana on June 6, 1981 at Edinburg, Illinois. The information on which these counts was based seems to have been developed from records found at the Andrew location September 1. Apparently chagrined at not having drawn the 1981 plea agreement so as to foreclose this prosecution, Anderson represented Ronald again. He filed a motion to quash the prosecution on double jeopardy grounds, and arranged a plea agreement November 8, 1982 which preserved the right to appeal from the denial of the motion to quash. Ronald was sentenced to one year and one day.

On September 10, 1982, Anderson filed a motion on behalf of Michael seeking appointment of Anderson to represent him. Michael had been determined to be indigent, and Michael and Ronald waived any conflict. The magistrate decided, however, that there was a conflict, and on September 16 appointed a different attorney. The latter represented Michael, who pled guilty,

and received a fee of $1,582.50 from the government under the Criminal Justice Act. He had spend two and three-quarters (2¾) hours in court and 75 hours out-of-court.

On April 11, 1983, Ronald wrote to the trial judge seeking assistance in obtaining representation on his appeal. The letter alleged that while Michael had paid Anderson $32,000 to represent him in the first case, and $25,000 to represent both him and Michael in the second case, Anderson was requesting an additional $5,000 to represent him on appeal. Ronald felt the amount paid was sufficient to include the appeal. He asked the trial judge to appoint Anderson as his public defender or to suggest that he handle the appeal without further compensation, or, if neither could be done, to appoint other counsel, since Ronald was indigent.

The district judge appointed Anderson. Anderson requested that someone else be appointed. On May 12, Chief Judge Ackerman issued an order reaffirming the appointment of Anderson, without compensation, and directing an evidentiary hearing to determine the facts and what sanctions, if any, were proper under the circumstances.[1]

On June 9, 1983, a hearing was held. Michael testified that he paid Gibson and Anderson a total of $57,500, consisting of cash payments of $25,000 to Gibson, plus Ronald's bond money of $7,500, and cash payments of $20,000 to Anderson, and the cancellation of a personal debt from Gibson in the amount of $5,000 after he was indicted. Michael testified that $32,500 was for representing Ronald in the first case, and $25,000 was for his own representation in the second case.

Ronald testified that his knowledge of the payments came from Michael, and that Michael's statements were consistent with his testimony.

Anderson painted a completely different picture of the arrangement. He asserted that he had an agreement with Michael to represent Ronald in the first case for $50,000 plus expenses. He only represented him in the second case because of what he viewed as his failure to represent Ronald adequately in the first case. He said he was never retained by Michael, although in February, 1982, he had proposed a written contract covering

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[1] Anderson represented Ronald on the appeal, although is was unsuccessful. *United States v. Strawser,* 739 F.2d 1226 (7th Cir. 1984).

representation of Michael for $40,000, plus expenses. He said there was never an agreement. The $20,000 later paid by Michael was applied on the $30,000 still due as of February 20, 1982 for Ronald's defense.

Judge Ackerman did not resolve the question whether the amount paid was $47,500 or $57,500, nor did he find that Michael had agreed to pay $50,000 plus expenses for Ronald's defense. Rather, "[t]o be fair to counsel, I take the salient facts, though disputed, in the light most favorable to him."

Finding that Anderson had been paid $47,500 for representing Ronald Strawser in the first case, the Judge found the fee exorbitant and unreasonable under the circumstances. *United States v. Strawser,* 581 F. Supp. 875, 877 (C.D. Ill. 1984). A reasonable fee for the services rendered in both cases and on appeal would have been $20,000. *Id.* at 878. Anderson was ordered to reimburse the United States Treasury $1,582.50 for Michael's representation and to remit $25,117.50[2] to the Treasury pending forfeiture proceedings.[3] *Id.* at 878.

Anderson relies on *United States v. Vague,* 697 F.2d 805 (7th Cir. 1983). In that case the district judge learned from the presentence report the amount of the attorney's fee paid by the convicted defendant. Without complaint from the defendant and because the judge sensed a violation of the code of ethics, the judge held a hearing, determined that an excessive fee had been charged, and ordered a refund of the excess.

The court, viewing the procedure as serving only the purpose of discipline for unethical conduct, concluded that it was "a mistake to graft onto a lawsuit an issue that the judge is neither asked nor required to resolve." 697 F.2d at 809. While noting that the district judge's concern was "praiseworthy," this court indicated that he should have reported the matter to an appropriate bar association committee, or should have invoked the procedure prescribed for discipline by the rules of his court. It was held that the district judge exceeded his power when he ordered restitution.

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[2] $25,117.50 plus $1,582.50 plus $20,000.00 equals $46,700.00, not $47,500.00. The difference may be due to inadvertent error, or perhaps an allowance for expenses. There was no cross appeal.

[3] At the hearing Michael testified that all the funds used to pay Anderson were derived from drug transactions. As such, they were subject to foreiture under 21 U.S.C. § 881(a)(6).

The situation now before us had an impact on the responsibilities of the district court beyond those of discipline for unethical conduct.

Ronald, a convicted defendant pursuing an appeal, claimed that his lawyer was demanding money for services for which he had already been paid. If the district court could do nothing to compel the performance of the service without an additional fee, Ronald informed the district court that he was indigent, and asked for appointment of counsel at government expense. Ronald also informed the court that some of the money had been paid Anderson for Michael's defense. Because of Michael's indigency, a probable result of Michael's payments to Anderson, the government had been required to pay $1,582.50 for other counsel. If Anderson owed Michael a refund because the conflict prevented performance of the service, the refund, if collected, would be reimbursable to the Treasury under 18 U.S.C. § 3006A(f).

We conclude that in this situation, unlike *Vague,* there was a solid foundation for the procedure undertaken by Judge Ackerman.

Appellant also argues that it was an abuse of discretion to find the fee excessive. An abuse of discretion occurs when, in reviewing or determining a fee, the court applies the wrong standard or fails to analyze the applicable factors. *State of Illinois v. Sangamo Const. Co.,* 657 F.2d 855, 862-63 (7th Cir. 1981); *Waters v. Wisconsin Steel Works of Int. Harvester Co.,* 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied,* 425 U.S. 997 (1976).

Appellant contends that the standard applied by the district court, the Illinois Code of Professional Responsibility, was inappropriate. But as was noted in *Vague,*

> [a]lthough the federal courts are not bound to apply state rules of professional ethics to lawyers practicing before them, *Theard v. United States,* 354 U.S. 278, 77 S.Ct. 1274, 1 L.E.2d 1342 (1957), we may assume without deciding that they would apply the Illinois rule as interpreted in *Kutner* [78 Ill.2d 157, 399 N.E.2d 963, 964-65 (1979)]. . . .

697 F.2d at 806. The standards found in Rule 2-106 of the Illinois Code of Professional Responsibility are identical to the factors this court adopted as guides in determining the reasonableness of a fee. *Waters,* 502 F.2d at 1322. Those factors were:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7)The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Id. Ill. code Prof. Resp. DR 2-106. These factors were also adopted by the American Bar Association and are set out in its Model Code of Professional Responsibility. Model Code of Prof. Resp. DR 2-106 (1982).

The district court considered all of the factors listed above. *Strawser,* 581 F. Supp. at 876-77. There was no abuse of discretion.

As stated by the district judge, "[i]t was readily apparent that Ronald Strawser was not going to trial in either case and the cases against him were not complex." *Id.* at 877. Anderson submitted time sheets (prepared for the hearing, and not contemporaneous entries). He claimed that he and Gibson spent over 800 hours on both of Ronald's cases .

The court found that it was "inconceivable . . . that a competent attorney could utilize 800 hours on this representation." *Id.* Judge Ackerman had presided over both cases, had thus observed Anderson's court appearances and was familiar with the results of his out of court activity. An attorney's effort is rarely limited to an eight hour day or forty hour week, but on the unlikely hypothesis that Gibson and Anderson devoted forty hour weeks to these cases, 800 hours would represent ten solid weeks each. Barely 17 weeks elapsed from arrest to plea in the first case and 11 from indictment to plea in the second case. The claim of time spent seems preposterous.

Judge Ackerman's findings were not unreasonable nor clearly erroneous.

The order appealed from is AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 30, 1986

Before
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 84-1367 vs.

RONALD STRAWSER,
Defendant,

APPEAL OF RICHARD L. ANDERSON,
Respondent-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division

No. 82CR 30067

J. WALDO ACKERMAN,
Judge

ORDER

On consideration of the petition for rehearing filed by counsel for the respondent-appellant on September 24, 1986 in the above-entitled cause, and all members of the panel having voted to DENY such petition, accordingly

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Rule IV. Standards for Professional Conduct

A. For misconduct defined in these Rules, and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before this court may be disbarred, suspended from practice before this court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant.

B. Acts or omissions by an attorney admitted to practice before this court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility adopted by this court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occured in the course of an attorney-client relationship. The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility adopted by the Supreme Court of Illinois, as amended from time to time by that court, except as otherwise provided by specific Rule of this court after consideration of comments by representatives of bar associations within the state.

Rule V. Disciplinary Proceedings

A. When misconduct or allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney admitted to practice before this court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these Rules, the Judge shall refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate.

B. Should counsel conclude after investigation and review that a formal disciplinary proceeding should not be initiated against the respondent attorney because sufficient evidence is not present, or because there is pending another proceeding against the respondent-attorney, the disposition of which in the judgement of the counsel should be awaited before further action by this court is considered or for any other valid reason, counsel shall file with the court a recommendation for disposition of the matter, whether by dismissal, admonition, deferral, or otherwise setting forth the reasons therefor.

C. To initiate formal disciplinary proceedings, counsel shall obtain an order of this court upon a showing of probable cause

requiring the respondent-attorney to show cause within 30 days after service of that order upon that attorney, personally or by mail, why the attorney should not be disciplined.

D. Upon the respondent-attorney's answer to the order to show cause, if any issue of fact is raised or the respondent-attorney wishes to be heard in mitigation this court shall set the matter for prompt hearing before one or more Judges of this court, provided however that if the disciplinary proceeding is predicated upon the complaint of a Judge of this court the hearing shall be conducted before a panel of three Judges appointed by the Chief Judge of the Court of Appeals for this Circuit.

Rule 2-106. Fees for Legal Services

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or excessive fee.

(b) A fee is excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment would preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(c) Contingent-Fee Agreements

(1) For purposes of this rule a contingent-fee agreement shall be deemed to be any agreement for the provision of legal services by a lawyer under which the amount of the lawyer's compensation is contingent in whole or in part upon the suc-

cessful accomplishment (by settlement or litigation) of the subject matter of the agreement, regardless of whether the fee is established by formula or in fixed amount.

(2) Any contingent-fee agreement shall be in writing. The original and each copy shall be signed by the lawyer and by each client. One signed copy shall be provided to each client at the time of making the agreement, and one shall be retained by the lawyer. Any contingent-fee agreement shall set forth the precise method by which the fee is to be determined, including the percentage, or percentages, if any, to be applied in the event of settlement, trial or appeal, whether expenses are to be deducted before or after the contingent fee is calculated and any other factors relevant to the fee arrangement.

(3) Upon final disposition of any action by settlement, trial or otherwise, a lawyer who has entered into a contingent-fee agreement shall prepare a closing statement setting forth in detail all information necessary to present a definitive statement of the application of the contingent-fee agreement in the action. One copy of the closing statement signed by the lawyer shall be provided to each party represented by him within a reasonable time after receipt by the lawyer of any sum or sums to which the contingent-fee agreement is applicable.

(4) No contingent-fee agreement shall be made in respect of the representation of a defendant in a criminal case. No contingent-fee agreement shall be made in respect of the procuring of a dissolution of marriage, declaration of invalidity of marriage, or legal separation, or the custody or adoption of children, or property settlement in or arising out of any of the foregoing; provided, however, that the prohibition set forth in this sentence shall not extend to representation in matters subsequent to a final decree such as the collection of arrearages in maintenance of child support. Contingent-fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims made in accordance with usual practices in respect of such cases shall not be subject to paragraphs (2) or (3) of this rule.

Amended June 26, 1981, effective Aug. 1, 1981.

18 U.S.C. §3006A

(f) Receipt of other payments.—Whenever the United States magistrate or the court finds that funds are available for payment

from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney. to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

21 U.S.C. §881. Forfeitures

Property subject

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner

in violation of the criminal laws of the United States, or of any State.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims

(b) Any property subject to forfeiture to the United States under this subchapter may be seized by the Attorney General upon process ussued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property. except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of prior judgment in favor of the United States in a criminal

injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil or criminal forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

(c) Custody of Attorney General

Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable

The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures affected by any customs officer.

(e) Disposition of forfeited property

Whenever property is civilly or criminally forfeited under this supchapter the Attorney General may—

(1) retain the property for official use or transfer the custody or ownership of any forfeited property to any Federal, State, or local agency pursuant to section 1616 of Title 19;

(2) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(3) require that the General Services Administration take custody of the property and dispose of it in accordance with law; or

(4) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General).

The proceeds from any sale under paragraph (2) and any moneys forfeited under this subchapter shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs. The Attorney General shall forward to the Treasurer of the United States for deposit in the general fund of the United States Treasury any amount of such moneys and proceeds remaining after payment of such expenses.

Forfeiture of schedule I substances

(f) All controlled substances in schedule I that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

Plants

(g)(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily foirfeited to the United States.

(2) The failure, upon demand by the Attorney General or his

duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

(h) Vesting of title in United States

All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil forfeiture proceedings

The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue

In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.